

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

76-2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
PHYLLIS SKLOOT BAMBERGER

-----x
LYMAN T. SHEPARD,

Appellant, :

-against- :

UNITED STATES BOARD OF PAROLE,

Appellee. :

No. 76-2021

B

APPENDIX FOR APPELLANT

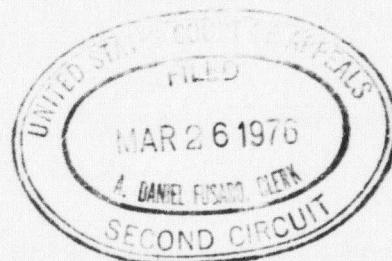
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER

Of Counsel

New York, New York
March 26, 1976



PAGINATION AS IN ORIGINAL COPY

United States Board of Parole

206	75-CV-597	12-22-75	3	530	1			0605
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PLAINTIFFS

DEFENDANTS

THE UNITED STATES OF AMERICA, ex rel.,
SHEPARD, LYMAN T.

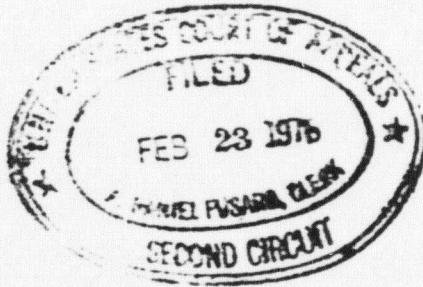
UNITED STATES BOARD OF PAROLE

CAUSE Plaintiff alleges that as a result
of a detainer he was prevented from
entering a program of college
education and a temporary release
program, etc.

ATTORNEYS

Lyman T. Shepard, 74-A-3989
Box B
Dannemora, N. Y. 12929

6-50-1



HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

FILING FEES PAID

DATE

RECEIPT NUMBER

CD NUMBER

STATISTICAL CARDS

CARD

DATE MAILED

JS-5

JS-6

DATE 1975	NR.	PROCEEDINGS
Dec. 22	1	Filed Petition for Writ of Habeas Corpus
Dec. 22	2	Filed Memorandum-Decision and Order of Judge Foley (12/19/75) denying and dismissing the Petition for Writ of Habeas Corpus & directing the Clerk to file the papers without payment of fees, also a copy of the decision in 75-CV-503 is to be mailed to the petitioner and Custis C. Crawford
Dec. 22 <u>1976</u>	3	Filed Judgment
Jan. 15	4	Filed Memorandum-Decision and Order of Judge Foley (1/14/76) granting the issuance of a certificate of probable cause and leave to proceed in forma pauperis. The clerk is directed to file the notice of appeal without payment of fee
Jan. 15	5	Filed Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEAN H. ORR, :
Petitioner : CIVIL NO. 74-341
v. : (Complaint Filed 5/3/74)
WILLIAM B. SAXBE, ATTORNEY GENERAL : (Judge Muir)
OF THE UNITED STATES,
et al., :
Respondents :

ORDER :
November 27, 1974

FILED
Williamsport, Pa.

NOV 21 1974

DONALD D. BERRY, Clerk
PER _____

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Petitioner is an inmate at the Federal Penitentiary in Lewisburg, Pennsylvania. He requests that the Court grant him a writ of habeas corpus pursuant to 28 U.S.C. §2241. The question in this case is whether the Due Process Clause of the Fifth Amendment to the United States Constitution requires a prompt parole revocation hearing after federal authorities lodge a detainer against a state prisoner on the basis of a parole violator's warrant, or whether it is acceptable to postpone the hearing to a time just prior to the taking of actual custody of the individual upon completion of his state sentence. On July 1, 1974, the Court issued an order which set a briefing schedule for the case and appointed counsel to represent the Petitioner. On August 20, 1974, the Petitioner was granted a continuance to the September trial list. Counsel for both parties have asserted that this case can be disposed of without the necessity of a hearing. Consequently, on September 30, 1974, respective counsel filed a stipulation of facts. On October 7, 1974, both counsel filed conclusions of law. On October 15, 1974, the Petitioner filed his brief in support of his petition for a writ of habeas corpus and on October 22, 1974, the Government filed its brief

in opposition to the petition for a writ of habeas corpus.

On January 18, 1966, the prisoner was sentenced to an 8-year term for the federal crime of bank robbery. On July 1, 1970, he was released on parole from this sentence. His parole supervisory period was to have expired on September 21, 1973. However, on March 14, 1972, the Petitioner was convicted of a violation of the criminal laws of the state of Massachusetts. On or about April 19, 1972, a federal parole violator's warrant, known as a detainer, was placed on the Petitioner by the Respondents and was filed with the Massachusetts Department of Corrections.

The Petitioner was released on parole from the Massachusetts Correctional Institution at Norfolk. At that time he was taken into the custody of the United States Marshal's Service. On November 8, 1973, he was given a preliminary parole revocation hearing pursuant to the parole violator's warrant. His final parole revocation hearing occurred on February 22, 1974. His parole was revoked for the commission of the state violation during the time of his parole. Petitioner's release date is, without earned good time, March 12, 1976.

Pursuant to the laws of the Commonwealth of Massachusetts, an individual who is convicted of a Massachusetts state crime while he is on parole from any other sentence and is committed to a Massachusetts Correctional Institution for service of his sentence under that conviction must serve two-thirds of his minimum sentence before becoming eligible for parole. Ordinarily, he would be required to serve only one-third of his sentence before becoming eligible for parole. However, the existence of a detainer against the individual pursuant to a parole violator's warrant is of no relevance in this determination. The law requires only that the crime be committed while the individual is on parole. Thus, Petitioner's parole release date from his state sentence was unaffected by the existence of the detainer in question.

2

An inmate in the Massachusetts correctional system who is within 18 months of parole release may be assigned a minimum security classification by which the individual becomes eligible to participate in certain rehabilitative programs. According to regulations promulgated by the Massachusetts Department of Corrections, the existence of a detainer against an inmate plays an important role in determining whether the inmate will be assigned minimum security status and thus be permitted to participate in those programs. This policy stems from a belief on the part of Massachusetts corrections authorities that such an inmate presents a greater potential escape risk than an inmate who has no detainer filed against him.

Massachusetts authorities also take into account the severity of the charge on which the detainer is based in determining the potential danger to society. The existence of a detainer does not, however, preclude an inmate's obtaining minimum classification status and participating in the special programs.

While at the Massachusetts correctional institution at Norfolk, the Petitioner was erroneously informed by his social worker that the detainees lodged against him would preclude his participation in the program (the Petitioner was also subject to a ~~detainer~~ lodged against him by the Municipal Court of the City of Boston which was nolle prossed on September 12, 1973). Massachusetts correctional institution records reveal no indication that the Petitioner ever formally applied for or was denied participation in any of the minimum security rehabilitative programs.

There exist two competing lines of cases dealing directly with the issue before us. On the one hand, there is the position represented by Small vs. Britton, 500 F.2d 299 (10th Cir. 1974). This case presents nearly identical facts to the one before this Court. The 10th Circuit held that while Morrissey vs. Brewer, 408 U.S. 471 (1970) requires a prompt revocation hearing after the execution of a parole revocation warrant, incarceration of the alleged parole violator in a state institution is, in the absence of a showing of "grievous loss" to that individual, an adequate reason for

delay from the time of the lodging of a detainer to the date of the revocation hearing. On the other hand, there is the position represented by Cooper vs. Lockhart, 489 F.2d 308 (8th Cir. 1973), which holds that an unreasonable delay in executing the parole violation warrant is in and of itself violative of the prisoner's due process rights. This latter holding is based on an assumption that such a delay necessarily causes certain harm to the inmate which he should not be required to prove with particularity. Morrissey is cited by Cooper for its statement that "delay in any procedure may well affect its fundamental fairness." Then, Cooper, like other cases which adopt a similar holding (see Sutherland vs. D.C. Board of Parole, 336 F.Supp. 270 (D.D.C. 1973) and Jones vs. Johnston, 368 F.Supp. 571 (D.D.C. 1974)) cites examples of probable harmful consequences of a delayed parole revocation hearing despite the individual's incarceration throughout the period of the delay. These cases assert that as a probable consequence of the delay the prisoner may lose the opportunity to have his unexpired sentence, for which he had been serving parole, run concurrently with the intervening sentence he is currently serving. They point out that the passage of time may also impair the prisoner's ability to present mitigating evidence with respect to his parole violation. They maintain that the continued existence of the unexecuted parole violator's warrant has a negative effect on the prisoner's rehabilitation and on his treatment by the prison officials in whose custody he is.

It is possible that the choice by this Court between these two positions can be obviated. If the Court should find that the Petitioner has demonstrated a "grievous loss" as required by the Small vs. Britton line of cases, then it would not be necessary to reach the choice between the two aforementioned points of view. A showing of "grievous loss" would satisfy the Small line and entitle the Petitioner to relief. Such a showing would, a fortiori, satisfy the Cooper line. Therefore, the Court will initially address the question of whether the Petitioner did in fact suffer "grievous loss" because of the delay in the execution of the parole violator's warrant.

The Petitioner contends that he has suffered grievous loss in four separate ways. They are as follows:

1. That due to the delay in conducting the revocation hearing, he was unable to present evidence which could have mitigated the seriousness of his parole violation and could have allowed him to receive a more lenient sentence than he might have received had the hearing been held promptly.

2. That because the hearing was not held until the conclusion of his state prison term, he lost the opportunity to serve the unexpired portion of his original federal sentence concurrently with the state sentence.

3. That because of the existence of a detainer, he was denied access to rehabilitative programs run by the Massachusetts Department of Corrections.

4. That because of the existence of the detainer, he was subjected to a general feeling of depression and was stripped of any motivation to conduct himself as a model prisoner and to acquire thereby a good institutional performance record.

The Court finds that none of these allegations by the Petitioner constitutes a "grievous loss." First, Petitioner has made no offer of anything which would lead this Court to find that an earlier execution of the parole violator's warrant would have allowed him to present mitigating evidence with regards to his parole violation. Second, the Petitioner was not denied the practical equivalent of having his unexpired sentence run concurrently with the intervening state sentence. When the hearing is held at the end of the state sentence, it is within the parole board's discretion to have the parole violator serve all, none or some portion of his unexpired sentence. Thus, in a situation where the parole board would have felt that a concurrent service of sentence would have been appropriate, it can still effectuate the same result by shortening the time required to be served on the remaining unexpired term.

Third, although Massachusetts admittedly made a distinction in the case of the Petitioner on the basis of the fact that a detainer was lodged against him, the Court does not feel that this created a grievous loss in his situation. The Massachusetts policy is to regard less favorably participation in certain rehabilitative programs by prisoners with detainees lodged against them. That policy decision is based on the fact that such an individual is a greater potential escape risk. Since Massachusetts had already determined that the Petitioner was on parole when he committed the state crime, it is unlikely that the additional existence of a detainer based on that parole violation significantly affected the evaluation as to his escape risk. Thus, although the Petitioner may have been somewhat affected in this way by the existence of the detainer, the Court does not feel that the additional effect of the detainer attained the status of a "grievous loss." Fourth, since the prisoner should be aware that the parole board has the discretion to have him serve all, none or only a part of his remaining sentence, it would seem that he would be motivated to establish an excellent state institutional behavior record. One could even argue that a delay in the revocation hearing works to the advantage of the parole violator. The delay gives him an opportunity to establish a good state institutional record and present this as mitigating evidence at his federal parole revocation hearing. Were the revocation hearing held promptly, the prisoner would not have that opportunity. The existence of that possibility casts considerable doubt on the Petitioner's assertion that the existence of the detainer demotivated him from establishing a solid institutional performance record.

Having concluded that the Petitioner has failed to show a "grievous loss" due to the delay between the time of the lodging of the detainer and the date of the revocation hearing, the Court is now confronted with the question of which of the two above-discussed lines to follow. The Court adopts the position represented by *Small vs. Britton*, supra. Consequently, the Petition will be dismissed because of the lack of a showing of a "grievous loss" on the part of Petitioner.

The Court recognizes that in adopting this position over the "pro se" position of the Cooper line, it has potentially incurred a greater burden. Use of this standard requires the Court to review on a case-by-case basis each allegation by a prisoner similarly situated to the Petitioner here. The "pro se" approach obviates the necessity of making this inquiry in each individual case where there is a delay in executing the detainer. Nevertheless, the Court finds that the underlying rationale for the "pro se" doctrine are unconvincing and that the existence of the detainer does not in and of itself cause such harm to a prisoner as to require this Court to order the Defendants to execute those detainees promptly. It should be noted, however, that in a case where a prisoner can demonstrate a "grievous loss" the Court will not hesitate to grant him relief in the form of a writ. Thus, by delaying execution of its warrant, the parole board in each case runs the risk that such a prisoner will be grievously harmed by the delay.

NOW, THEREFORE, IT IS ORDERED THAT:

The petition in the above-captioned case is dismissed.



NUIR, United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 75-1042

DEAN H. ORR,
Appellant

v.

WILLIAM B. SAXBE, ATTORNEY GENERAL
OF THE UNITED STATES

and

MAURICE H. SIGLER, CHAIRMAN,
UNITED STATES BOARD OF PAROLE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
C. A. No. 74-341

Submitted Under Third Circuit Rule 12(6)
June 10, 1975

Before: ADAMS, HUNTER and GARTH, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, specifically that (1) appellant demonstrated to the court below that the delay in his federal parole revocation hearing caused him a "grievous loss," within the meaning of Morrissey v. Brewer, resulting in a denial to him of his Fifth Amendment right to due process of law; and (2) that the due process clause of the Fifth Amendment requires in all cases that a prompt parole revocation hearing be afforded a federal parolee who is in state custody at the time the parole violation warrant is issued and lodged as a detainer against the parolee; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed on the basis of the opinion of the district court, Orr v. Saxbe, Civ. No. 74-341 (M.D.Pa., filed November 27, 1974).

BY THE COURT,

C. L. M. Glavin
Circuit Judge

ATTEST:

M. E. Jackson
Chief/Deputy Clerk

DATED: June 17, 1975

FILED

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUL 16 1975

ABNER B. COLANGELO,

JOHN P. HEHMAN, Clerk

Petitioner-Appellant

v.

O R D E R

UNITED STATES BOARD OF PAROLE,

Respondent-Appellee

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

This is an appeal from the denial by the district court of appellant's petition for writ of habeas corpus alleging that the United States Parole Board denied the appellant a prompt preliminary hearing as called for by Morrisey v. Brewer, 408 U.S. 471 (1972).

In a careful opinion, District Judge Don J. Young held that petitioner, who was currently serving a 5-100 year sentence imposed by the State court in Ohio, was not entitled to such a hearing where it appeared that a parole violation warrant had been issued by the United States Parole Board, but remained unexecuted pending completion of the State sentence. We agree for the reasons set forth by Judge Young in his opinion of December 11, 1974.

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
By Grace Keller
Grace Keller, Chief Deputy

United States Department of Justice
United States Board of Parole
Washington, D.C. 20537

April 20, 1973

Warden

Re:

Dear Sir:

The above named individual who is presently serving sentence in your institution is wanted by this office as a violator.

The U.S. Board of Parole issued a violator warrant

In order that his case may be reviewed in this office, will you please furnish us with a report on his progress and adjustment. Also, advise if he is scheduled to appear before your Parole Board, and if so, when. If his case has been voted on advise us of the results, and whether or not a release date has been set.

Sincerely,

STEVE D. JOHNSTON
4/17/73
Parole Executive

BY:

STANLEY B. KRUGER
Case Analyst

OKR:sk

cc:

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537



Order

Name

Register Number.....

Institution

In the case of the above-named, the Board (or its Youth Correction Division) in its offices in Washington, D.C. has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release status is hereby ordered:

Warrant issued

Conditions or remarks:

United States Board of Parole:

Date

Conditions or remarks:

United States Board of Parole:

Date June 13, 1972

A handwritten signature in cursive ink that reads "Maurice M. Doyle". It is written over a decorative horizontal flourish.

Conditions or remarks:

United States Board of Parole:

Date

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington

Summary By Case Analyst
DISPOSITIONAL REVIEW

I. Name: _____ No. on Warrant: _____
Current Reg. No.: _____

II. Original Sentence Data:

Offense: _____
Length of Sentence: _____
Date and Type of Release: _____
Warrant Issued: _____
Charges on Warrant Application: _____

Days Remaining to be Served: _____
Original Expiration of Term: _____

III. Current Sentence Data:

Offense: _____
Date and Jurisdiction of Conviction: _____
Length of Current Sentence: _____
Place of Current Custody: _____
Current Parole Status: _____
Tentative Release Date: _____

IV. Nature of Request:

V. Pertinent Prior Record:

VI. Pertinent Social Factors:

VII. Additional Factors:

VIII. Recommendation:

[Signature]
(Analyst) (Examiner)

Date

GPO 1970-O-241-163